The opinion in support of the decision being entered today was <u>not</u> written for publication and is <u>not</u> binding precedent of the Board.

<div align="right">Paper No. 15</div>

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UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES
_____

<u>Ex parte</u> SHERIF KOTTAPURATH and JORDAN BROWN
_____

Appeal No. 1999-2255
Application No. 08/885,393
_____

ON BRIEF
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Before THOMAS, KRASS, and BLANKENSHIP, <u>Administrative Patent Judges</u>.

BLANKENSHIP, <u>Administrative Patent Judge</u>.

<div align="center"><u>DECISION ON APPEAL</u></div>

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1-31, which are all the claims in the application.

We affirm-in-part.

BACKGROUND

The invention relates to method and apparatus to ensure that the version of a program on a computer workstation which is on a network is a timely (latest) version of the program. If the current version on the local computer is not the latest version, then the latest version is transferred from the network server to the computer. Claims 1 and 31 are reproduced below.

1.    A computer system, comprising:

a local computer configured to store a current program;

a network server configured to store a latest program, and an identifier program for generating an identification corresponding to the latest computer program upon interrogation;

an updater program configured to cause the latest program to be transferred from the network server to the local computer and replace the current program; and

a startup program which is configured to run when the local computer is started up, interrogate the identifier program, determine if the identification corresponds to the current program, and if the identification does not correspond to the current program, run the updater program.

31.    A computer program embodied in a computer-readable medium including a latest computer program and an identifier program, said identifier program comprising:

a receiving code segment for receiving and processing an interrogation; and

an identification generating code segment for generating an identification corresponding to the latest computer program in response to the interrogation.

The examiner relies on the following references:

Ottman et al. (Ottman)               5,142,680              Aug. 25, 1992
Cole et al. (Cole)                    5,752,042             May 12, 1998
                                                          (filed Jun. 7, 1996)

Claims 1-4, 6, 7, 9-11, 13-17, 19, 20, 22-24, 26, 27, and 29-31 stand rejected under 35 U.S.C. § 102 as being anticipated by Cole.[1]

Claims 5, 8, 12, 18, 21, 25, and 28 stand rejected under 35 U.S.C. § 103 as being unpatentable over Cole and Ottman.

A rejection under 35 U.S.C. § 112 that was set forth in the Final Rejection has been withdrawn by the examiner.

We refer to the Final Rejection (mailed Dec. 18, 1998) and the Examiner's Answer (mailed Mar. 15, 1999) for a statement of the examiner's position and to the Brief (filed Mar. 2, 1999) for appellants' position with respect to the claims which stand rejected.

OPINION

Appellants provide reasons in the Brief why the subject matter of independent claim 1 is believed to be not anticipated by the Cole reference. Appellants argue that "Cole does not disclose any program other than an operating system which is run when the local computer is started up." (Brief at 6.) The examiner responds (Answer at 3)

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[1] According to the Examiner's Answer, claims 2, 3, 6, and 7 are both anticipated by Cole and "objected to" but deemed allowable if rewritten in independent form. We will assume that the claims stand rejected.

that Cole describes, at column 3, lines 45-55, the BIOS containing instruction codes for booting the system.  The examiner further refers to material in the figures and Abstract of Cole.

Claim 1 recites "a startup program which is configured to run when the local computer is started up."  The "startup program" is further configured to interrogate the identifier program and run the updater program if the current computer program does not correspond to the latest computer program.

We agree with appellants that Cole fails to disclose a "startup program" as required by instant claim 1.  As described by Cole (col. 3, ll. 7-55), a user at client computer 14 (Fig. 2) selects an icon to invoke update manager 32.  First, the programs residing on client computer 14 (e.g., scout 33) that are mainly responsible for updating other programs on the computer are checked to determine if those programs correspond to the latest versions.  If not, the server sends FTP addressing information for the latest versions, and the client downloads and installs the latest versions of those programs on the client computer which serve for the general updating of the remainder of the computer.

The system BIOS of the client computer is mentioned at column 3, lines 45 through 55 of the reference.  However, the reference to the BIOS is within the context of providing examples of the client computer's basic system information which is sent to the selection server 12, for determining which code updates are consistent with that particular client computer (col. 3, l. 56 - col. 4, l. 1).

Moreover, the rejection (Final Rejection at 6) appears to equate most of the functions associated with the "startup" program of claim 1 with Cole's "update manager" 32, found on client computer 14 (Fig. 2).

The determination of whether the programs necessary in managing the general updating of the client are outdated is made by general manager 31 on selection server 12 (col. 3, ll. 19-22). For the general updating itself, described at column 3, line 56 et seq. of the reference and further shown in Figures 3(a) and 3(b), selection update program 30 (on selection server 12) determines which code updates are consistent with the basic system information of the client. For each code update that is indicated, selection update program 30 sends to the client 14 the FTP addressing information of a corresponding "recognizer" program (e.g. 40 and 42 on content server 17). Client 14 then downloads the recognizer programs. Client 14 executes each recognizer program (e.g., 40 and 42) to assist the server in determining whether the corresponding code update is appropriate for client 14. The client subsequently sends to selection server 12 a list of the code updates which are appropriate for the client.

Based on the information gathered by the recognizer programs, the server determines the level of criticality of the respective code updates and builds a selection form for display at the client. The user at client 14 makes selections from the display with respect to code updates that are to be ordered. The server 12 in response sends to client 14 the FTP addressing information for the selected code updates. Download routine 39 of the client downloads the code updates from the content server 17. The

client is requested to re-boot, and the operating system installs the code updates during the re-boot.

Thus, update manager 32 does not "interrogate" an identifier program on the server and "determine" if the identification of the latest computer program corresponds to the current program, as required by instant claim 1. In Cole's arrangement, the client sends information to the server and recognizer programs are loaded from the server to determine whether programs on the client should be updated. Update manager 32 of Cole does not meet all the requirements of the "startup program" of instant claim 1.

For the foregoing reasons, we do not sustain the section 102 rejection of claim 1, nor of claims 2-4, 6, 7, 9-11, and 13 depending therefrom.

Appellants do not point to any language in instant claims 14 and 27 that is deemed to distinguish over Cole. Appellants allege that the claims "recite essentially the same operations set forth in claim 1." (Brief at 12.) Nor do appellants point out particular limitations of claims 14 and 27 in the amplifying arguments presented on pages 13 through 17 of the Brief.

Method claim 14 recites "providing a startup program." Unlike claim 1, claim 14 does not limit the "startup program" as configured to run "when the local computer is started up." Claim 14 does, however, require that the startup program is configured to interrogate the identifier program, "determine if the identification corresponds to the current program," and to run the updater program if the current program fails to correspond to the latest program.

In view of these requirements of claim 14, we cannot agree that Cole anticipates the claim. We have considered the examiner's position, set forth at page 9 of the Final Rejection and page 3 of the Answer. However, as we have previously noted, we disagree that update manager 32 (Fig. 2) "determine[s] if the identification corresponds to the current program," as set forth in claim 14.

We therefore do not sustain the section 102 rejection of claim 14, nor that of depending claims 15-17, 19, 20, 22-24, and 26.

With respect to instant claim 27, "interrogating," "determining," and "transferring" code segments as claimed are found in general manager 31 in server 12 (Fig. 2) of Cole. Col. 3, ll. 14-39. Appellants' arguments at pages 6 and 7 of the Brief, purported to be applicable to claim 27, are not commensurate with the scope of the claim. Claim 27 says nothing about a "startup" program. Operation of general manager 31 is "automatic" at least subsequent to control to the program being transferred by a user invoking update manager 32 -- even assuming the word "automatically" in the preamble of claim 27 limits the scope of the claim.

We therefore are not persuaded of error in the examiner's finding of anticipation with respect to claim 27. We sustain the section 102 rejection of claim 27, and also the rejection of dependent claims 29 and 30. Appellants have not separately argued the claims depending from 27; the claims fall with the base claim. See 37 CFR § 1.192(c)(7).

Appellants present no separate arguments for independent claim 31, but submit that the claim is allowable due to its "dependence" from claim 14 or 27. (Brief at 13.) In fact, the claim is significantly broader in scope than appellants' model claim 1, and thus not commensurate with the arguments presented for the independent claims. General manager 31 in server 12 receives and processes an interrogation from client computer 14, and generates an identification corresponding to the latest computer program in response to the interrogation. See Cole at col. 3, ll. 14-39. We sustain the section 102 rejection of claim 31.

In response to the rejection of claims 5, 8, 12, 18, 21, 25, and 28 under 35 U.S.C. § 103 as being unpatentable over Cole and Ottman, appellants rely on the arguments advanced against the section 102 rejection applied to the independent claims. Because all limitations of respective claims 5, 8, 12, 18, 21, and 25 (depending from claim 1 or 14) have not been shown to be disclosed or suggested by the references -- Ottman does not remedy the deficiencies of the Cole reference -- we do not sustain the section 103 rejection of claims 5, 8, 12, 18, 21, or 25.

Claim 28, depending from claim 27, is also subject to the section 103 rejection. Because: (1) appellants have advanced no arguments specific to claim 28; (2) we have sustained the rejection of base claim 27; and (3) the examiner has set out a reasonable prima facie case for obviousness with respect to claim 28 -- i.e., that the combination of Cole and Ottman would have suggested updating operating systems as recited -- we sustain the rejection of the claim.

We have considered all of appellants' arguments in making the determinations

set forth above.  However, arguments not presented are deemed waived.  See 37 CFR

§ 1.192(a) ("Any arguments or authorities not included in the brief will be refused

consideration by the Board of Patent Appeals and Interferences, unless good cause is

shown.") and § 1.192(c)(8)(iv) (the brief must point out the errors in the rejection).

### SUMMARY and CONCLUSION

The rejection of claims 27 and 29-31 under 35 U.S.C. § 102 as being anticipated

by Cole is affirmed.  The rejection of claims 1-4, 6, 7, 9-11, 13-17, 19, 20, 22-24, and

26 under 35 U.S.C. § 102 as being anticipated by Cole is reversed.

The rejection of claim 28 under 35 U.S.C. § 103 as being unpatentable over Cole

and Ottman is affirmed.  The rejection of claims 5, 8, 12, 18, 21, and 25 under 35

U.S.C. § 103 as being unpatentable over Cole and Ottman is reversed.

The examiner's decision in rejecting claims 1-31 is thus affirmed-in-part.

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No time period for taking any subsequent action in connection with this appeal

may be extended under 37 CFR § 1.136(a).



<u>AFFIRMED-IN-PART</u>




JAMES D. THOMAS )
Administrative Patent Judge )
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) BOARD OF PATENT
ERROL A. KRASS )     APPEALS
Administrative Patent Judge )      AND
)  INTERFERENCES
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)
HOWARD B. BLANKENSHIP )
Administrative Patent Judge )

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TIMOTHY E. MANNING
ARTER & HADDEN LLP
1100 HUNTINGTON BUILDING
925 EUCLID AVENUE
CLEVELAND , OH  44115-1475